of section 66 of the Courts of Judicature Act which provides:

"The Federal Court shall hear and determine the question reserved and may make such orders as the High Court might have made as it may consider just for the disposal of the appeal."

He also cited the following cases: *Sim Tiew Bee* v. *Public Prosecutor;*[4] *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor;*[5] and *Attorney-General for Northern Ireland* v. *Gallagher.*[6]

We agree that the whole case may now be re-argued as a regular appeal by Mr. Palasuntharam to satisfy us that the conviction by the learned Magistrate was wrong.

Order accordingly.

Solicitor: *V.K. Palasuntharam.*

PUBLIC PROSECUTOR v. MOHAMED NOOR BIN JANTAN

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), Chang Min Tat, Syed Othman & Ibrahim Manan F.JJ.) May 14 & July 12, 1979]

[Kuala Lumpur — Federal Court Criminal Reference No. 5 of 1978]

Criminal Law and Procedure — Cautioned statement — Whether defence entitled to ask prosecution to tender cautioned statement as evidence during course of case for prosecution — Recording officer called as witness may be required to produce statement — Cautioned statement to be marked as defence exhibit if introduced at instance of defence — No trial within trial necessary if defence does not challenge voluntary nature of statement — Internal Security Act, 1960, s. 75.

In this case at the trial of the respondent on a charge under the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, the prosecution elected not to use a cautioned statement that had been recorded from the respondent. The statement was however admitted at the request of the defence, over the objection of the prosecution, and marked as a prosecution exhibit. The respondent was subsequently acquitted. The learned judge on the application of the Public Prosecutor reserved the following questions of law for the determination of the Federal Court;

"(1) Whether or not the defence is entitled in law to cause the prosecution to tender as evidence the cautioned statement recorded from the accused person during the course of the case for the prosecution when the prosecution does not intend to introduce it as part of the prosecution case?

(2) If the answer to question (1) is in the affirmative, whether the cautioned statement should be marked as a defence exhibit?

(3) Whether or not a trial within a trial should in law be held before the cautioned statement could be admitted as evidence at the insistence of the defence during the course of the case for the prosecution when the voluntariness of the making of the cautioned statement is not disputed by the defence?"

Held: (1) the prosecution is not obliged to tender the statement if it does not itself wish to use it during the trial. If the prosecution does not call the recording officer, the prosecution cannot be compelled to tender the statement in evidence. The accused may however call the recording officer to prove the statement, as part of his case;

(2) if the recording officer is called by the prosecution, the defence must, if it relies on the statement, put to the officer whether or not he had recorded a statement from the accused; and if he answered yes and refused to produce the statement at the request of the defence, he could be ordered by the court to produce it, which order it would be contempt of court for him to disobey;

(3) if the defence succeeds in having the cautioned statement tendered in evidence during the course of the case for the prosecution, it should be marked as a defence not as a prosecution exhibit;

(4) no trial within a trial need be held before the statement is admitted in evidence at the instance of the defence if its voluntary nature is not disputed.

[Editorial Note: The following authorities were referred to at the hearing of the reference:- *Lim Ah Tong* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 159 and *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.]

FEDERAL COURT.

Mah Weng Kwai (Deputy Public Prosecutor) for the applicant.

R.R. Sethu for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): The accused was charged as follows:

"That you on June 25, 1974 at about 2.50 p.m. at No. 16, Hale Road, in the City of Kuala Lumpur, did have in your possession an offensive weapon, to wit a 'Kerambit' knife otherwise than with lawful authority, and that you have thereby committed an offence punishable under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance No. 43/58."

During his trial the prosecution elected not to use a cautioned statement that had been recorded from him. While the recording officer was being cross-examined, defence counsel applied to get him to produce the statement, relying on section 75 of the Internal Security Act, 1960. Over the objection of the prosecution officer, it was admitted and marked as Exhibit P2, not be it noted as a defence exhibit.

After PW2 had finished his evidence the prosecution closed its case and defence counsel submitted no case to meet. The learned President agreed and acquitted and discharged the accused.

On appeal the High Court upheld the acquittal.

On application by the Public Prosecutor, the learned judge acting under section 66 of the Courts of Judicature Act reserved for our decision the following questions of law of public interest which had arisen in the course of the appeal and the determination of which had affected the event of the appeal:

"(1) Whether or not the defence is entitled in law to cause the prosecution to tender as evidence the cautioned statement recorded from the accused person during the course of the case for the prosecution when the prosecution does not intend to introduce it as part of the prosecution case?

(2) If the answer to question (1) is in the affirmative, whether the cautioned statement should be marked as a defence exhibit?

(3) Whether or not a trial within a trial should in law be held before the cautioned statement could be admitted as evidence at the insistence of the defence during the course of the case for the prosecution when the voluntariness of the making of the cautioned statement is not disputed by the defence?"

Let two things be noted about the first question. First, it asks whether the *prosecution* is obliged at the instance of the defence to tender as evidence the cautioned statement. Secondly, it asks whether the prosecution is so obliged during the course of *the case*

for the prosecution, not that the prosecution is obliged to supply a copy of the statement to the defence before the trial.

In our judgment the prosecution is *not* obliged to tender the statement if it does not itself wish to use it during the trial. If the prosecution does not call the recording officer, the prosecution cannot be compelled to tender the statement in evidence. In that case if the defence wishes to have it admitted as an exhibit, it has to wait until after the close of the prosecution case and then, during its own case, call the recording officer to prove the statement.

The prosecution has complete discretion as to what evidence it wants to use and what it does not want to use. It may not want to use the cautioned statement because it has ample other evidence to prove its case and tendering the statement may in its opinion waste the court's time — or because the statement is irrelevant — or because it does not believe that its contents are truthful and tendering it in evidence will be inconsistent with its other evidence, for if it adduces the statement it is taken to rely on its contents as part of its case.

Such is the position if the recording officer is not called by the prosecution.

If on the other hand the recording officer is called, the defence must, if it relies on the statement, put to the officer whether or not he had recorded a statement from the accused; and if he answered yes and refused to produce the statement at the request of the defence, he *could* be ordered by the court to produce it, which order it would be contempt of court for him to disobey. In our judgment, it is immaterial whether or not the statement is a public document — for the principle is that a witness who has any document which is within his possession or power which is required by the defence and which is material to the defence, is bound to produce it; and this rule applies whether or not the document is public or private — save that in the case of a document within the possession or power of Government, Crown privilege may in certain circumstances be claimed. And it is not suggested that the cautioned statement here is protected by Crown privilege.

This ruling of ours is limited to admissibility under section 75 of the Internal Security Act, and does not affect the question of admissibility under sections 74 and 76 of the Evidence Act.

In our opinion, the instant case is similar to the case of a person charged with, say, criminal breach of trust of money belonging to a company, a case in which during the course of investigation many account books were seized by the police, but during the prosecution case the Deputy Public Prosecutor tenders as part of the prosecution case only certain books. In that event it is open to the defence while the police officer concerned is in the witness box to elicit from him whether or not he had also seized and has in his possession other account books, the contents of which might in the opinion of the defence put a different complexion on the prosecution case. It is clear that in that case the officer may not refuse to produce these other account books, and if he did he could be compelled by the court to produce them.

Or take another case, say a case of murder. If the investigating officer had seized various objects at the scene but during examination-in-chief produced only some of them which the Deputy Public Prosecutor thought relevant and helpful to his case, it is open to the defence during cross-examination to insist that the officer produce other objects thought to be helpful to the defence.

So in our judgment the answer to question (1) is this: the prosecution is free to tender or not in evidence the cautioned statement; but if the recording officer gives evidence the defence is entitled to cause him to tender it in evidence even though the prosecution does not itself want to introduce it as part of its case. But if the recording officer is not called by the prosecution, he must be called by the defence during the course of the defence case for this purpose.

As regards question (2), if the defence succeeds in having the cautioned statement tendered in evidence during the course of the case for the prosecution, it should be marked as a *defence*, not as a prosecution exhibit. The statement is introduced at the instance of the defence, the defence seeks to rely on it, it should therefore be marked as a defence exhibit — to make clear that it is part of its, not the prosecution, case. In that event the prosecution is free to comment adversely on its contents as being irrelevant or being inconsistent with the prosecution evidence and therefore not truthful.

As regards question (3) — in our judgment the answer is that no trial within a trial need be held before the statement is admitted in evidence at the instance of the defence if its voluntary nature is not disputed.

It is true that the general rule is that a cautioned statement is admissible only if the court is satisfied that it was made voluntarily, and if it is suggested by the defence that it has not been so made, a trial within a trial should be held — so that the prosecution can satisfy the court that the opposite is the case. But if, on the other hand, the defence does not challenge the voluntary nature of the statement, there is no reason whatsoever for holding a trial within a trial.

Order accordingly.

Solicitors: *Chin & Sethu.*